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DISCUSSION OF RECENT DECISIONS

CEMETERIES—COMPANIES AND ASSOCIATIONS—WHETHER CEMETERY ASSOCIATION FORMED UNDER SPECIAL CHARTER POSSESSES IMPLIED POWER TO SELL MONUMENTS AND MARKERS FOR INSTALLATION WITHIN THE CEMETERY—A relatively unique factual situation was brought to the attention of the Illinois Supreme Court when it took jurisdiction of the appeal in the case of *People ex rel. J. H. Anderson Monument Company* v. *Rosehill*

Cemetery Company.[1] The action had been instituted as a proceeding in *quo warranto*[2] by a private corporation[3] engaged in the business of selling monuments and markers[4] to question the right of the defendant, a private cemetery association incorporated under a special charter,[5] to engage in the business of selling similar products for installation on graves located in the defendant's cemetery. The defendant, while challenging the right of the relator to conduct the proceeding,[6] rested its principal defense on the proposition that it had express power,[7] or at least implied power, to do as it did.[8] The trial court agreed with this contention and dismissed the proceeding, but on direct appeal,[9] a majority of the Supreme Court voted to reverse when it reached the conclusion that the power to operate a cemetery did not extend to support an implied power to engage in the monument business.

The first issue dealt with, one of secondary importance except as to the litigants, concerned the question as to whether or not the relator had such an interest in the defendant's charter powers as would entitle it to maintain the action in question. Prior to the present statute on the subject,[10] an information in the nature of quo warranto was available to enforce private as well as public rights[11] but only the Attorney General or a local state's attorney, with limited discretion, was empowered to grant a petition to file such informations.[12] Private rights have, however, been upheld through this procedure, as in the case of *People ex rel. Kinsella* v.

[1] 3 Ill. (2d) 592, 122 N. E. (2d) 283 (1954). Hershey, J., wrote a dissenting opinion in which Fulton, J., concurred. Klingbiel, J., also wrote a dissenting opinion.

[2] Ill. Rev. Stat. 1953, Vol. 2, Ch. 112, § 9 et seq.

[3] Leave of court for the purpose, required by ibid., § 10, had been obtained after the duly constituted public officials had refused to conduct the proceedings on behalf of the state.

[4] The relator's place of business was near the cemetery in question and its business had declined approximately 50% since the defendant had begun to sell in competition with it.

[5] Ill. Private Laws 1859, p. 29, as amended by Ill. Private Laws 1863, p. 174.

[6] The dissenting judges were of the opinion that the relator lacked the essential "interest in the question" required to justify complaint by a private citizen.

[7] Defendant relied on an express authority to "lay out, arrange and dispose of burial lots" as well as one permitting it to "erect such buildings, tombs, enclosures or other structures" as might be deemed advisable.

[8] The defendant's answer denied that it had engaged in the business of selling monuments indiscriminately but admitted the sale to those who had lots in the cemetery in question. It does not appear to have been contended that the defendant acted so as to exclude monuments purchased elsewhere.

[9] Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 199, authorizes direct appeal where a franchise is involved.

[10] Ill. Rev. Stat. 1953, Vol. 2, Ch. 112, § 9 et seq.

[11] Ibid., 1935, Ch. 112, §§ 1-8.

[12] These officers were required to secure leave of court before instituting the action and, in the event the request of the private party was rejected, it was necessary to institute mandamus proceedings to test the validity of such rejection.

Crowe,[13] where the owners of real estate questioned the power of a municipality to initiate and levy a special assessment for the improvement of a part of a street, and in the case of *People ex rel. Paxton* v. *Bloomington Cemetery Association*,[14] where the daughter of one who had purchased a lot in a cemetery questioned the right of the latter to buy, sell, and deal in grave boxes and to enforce a rule forbidding the use of grave boxes or vaults other than those purchased from the association.

Since 1937, following the enactment of the present statute which permits the private person an opportunity to secure a hearing, despite official rejection of the request, so long as leave of court can be obtained,[15] several cases have been brought to enforce individual rights and the Supreme Court, endeavoring to interpret the interest a private relator must have in order to maintain the action, has consistently said that, before a private person may be granted a petition for quo warranto, he must have an interest personal to himself and not one that is possessed by the public in general.[16] An illustration of what is meant may be found in the case of *People ex rel. Koch* v. *Wilson*,[17] where the court upheld a private petition against a school district to question the exclusion of certain areas of land from the district with a view toward preventing the relators from voting at an election, although, by such election, the defendants sought to annex the greater portion of the lands of the several relators for taxing purposes. As the competition provided by the cemetery in question in the instant case had caused a substantial diminution in the business of the relator, a majority of the court were able to find that the relator did have a sufficient individual pecuniary interest to maintain the action.

The principal issue in the case dealt with the power of the cemetery association, under its special charter,[18] to engage in the business of selling monuments and markers. A cemetery corporation, like any other corporate body, has only those powers which are expressly granted to it by its charter or the statute under which it is formed and such implied powers as are necessary for the purpose of carrying out its expressed powers and the objects for its incorporation.[19] The powers of such legal entities

[13] 327 Ill. 106, 158 N. E. 451 (1927).

[14] 353 Ill. 534, 187 N. E. 455 (1933).

[15] Ill. Rev. Stat. 1953, Vol. 2, Ch. 112, § 10.

[16] People v. Wood, 411 Ill. 514, 104 N. E. (2d) 800 (1952); Adair v. Williams, 407 Ill. 309, 95 N. E. (2d) 345 (1950); People ex rel. Buchanan v. Mulberry Grove Com. High School Dist., 390 Ill. 341, 61 N. E. (2d) 256 (1944); Rowan v. City of Shawneetown, 378 Ill. 289, 38 N. E. (2d) 2 (1941).

[17] 346 Ill. App. 175, 104 N. E. (2d) 559 (1952).

[18] See note 5 ante. The corporation had been organized prior to the enactment of any general law on the subject.

[19] 13 Am. Jur., Corporations, § 739, p. 770.

being limited by the charters of incorporation,[20] all sections thereof must be considered together in determining the scope and extent of the lawful activity[21] but it is generally considered proper to construe these powers strictly so as to prevent rights from being given to the corporation beyond those which the words of the grant convey.[22]

In that connection it may be noted that a typical charter for a cemetery corporation would grant the right to operate and maintain a cemetery, with the authority to purchase lands, lay out, arrange, and dispose of burial lots to purchasers,[23] with the additional right to adopt reasonable rules and regulations for the management of the cemetery[24] so long as such rules and regulations did not transcend the rights and powers given by the charter.[25] The precise activities which any particular cemetery corporation would be entitled to engage in under its charter would, however, depend upon the interpretation given to these express powers, as well as powers by implication, by the particular jurisdiction for certain activities have been permitted in one state but denied in another.

By way of illustration, it may be noted that certain activities have been permitted on the ground they were related, or at least were incidental, to the acquisition and maintenance of the cemetery on the theory that those who apply for the permanent disposition of the dead are looking for advantageous, convenient, and most complete facilities.[26] For this reason acts involving the operation of a greenhouse upon the cemetery premises, even though a small profit was made,[27] the buying and selling of stone

20 Omaha Nat. Bank v. West Lawn Mausoleum Association, 158 Neb. 412, 63 N. W. (2d) 504 (1954); Oakland Cemetery Co. v. People's Cemetery Ass'n, 93 Tex. 569, 57 S. W. 27, 55 L. R. A. 50 (1900).

21 Rhode Island Hospital Trust Co. v. Proprietors of Swan Point Cemetery, 63 R. I. 79, 7 A. (2d) 205 (1939).

22 Skaneateles W. P. Co. v. Village of Skaneateles, 161 N. Y. 154, 55 N. E. 562 (1899); Palmer v. Hickory Grove Cemetery, 84 App. Div. 600, 82 N. Y. S. 973 (1903).

23 The precise language of the charter granted the cemetery involved in the instant case is set forth above at note 7, ante. See also People ex rel. Paxton v. Bloomington Cemetery Ass'n, 353 Ill. 534, 187 N. E. 455 (1933).

24 10 Am. Jur., Cemeteries, § 15, p. 496, and 14 C. J. S., Cemeteries, § 3, p. 65.

25 Steele v. Rosehill Cemetery Co., 370 Ill. 405, 19 N. E. (2d) 189 (1939); Johnson v. Cedar Memorial Park Cemetery Ass'n, 229 Iowa 749, 295 N. W. 136 (1940). See also Rice v. Sioux City Memorial Park Cemetery, — Iowa —, 60 N. W. (2d) 110 (1953), affirmed on cert. by a divided court in — U. S. —, 75 S. Ct. 122, 99 L. Ed. (adv.) 77 (1954), but later dismissed on rehearing in — U. S. —, 75 S. Ct. 614, 99 L. Ed. (adv.) 507 (1955).

26 Wing v. Forest Lawn Cemetery Association, 15 Cal. (2d) 472, 101 P. (2d) 1099, 130 A. L. R. 120 (1940).

27 State v. Lakewood Cemetery Association, 93 Minn. 191, 101 N. W. 161 (1904).

vaults to the lot owners at cost,[28] the making and selling of wooden and concrete vaults on a cost basis,[29] and the operation of a mortuary upon the cemetery premises[30] have been declared to be *intra vires.*

Despite this, the Supreme Court of Massachusetts, not too long ago, said that "the enterprise of operating a cemetery is distinct from and need not be associated with the business of selling monuments for cemetery lots [for a] cemetery may be operated successfully and in full performance of all its obligations to lot owners and others without selling monuments."[31] It has also been decided, in Illinois, that a power to lay out land for burial purposes does not extend to the point of authorizing the corporation to engage in, or create a monopoly over, the business of constructing and selling grave boxes or vaults,[32] and the power to lay out, enclose, and ornament a plat or piece of ground to be used as a burial place does not necessarily support the right to construct and sell markers and monuments for profit.[33] Without question, therefore, it would be improper for the cemetery to lease its unoccupied land for mining purposes in the absence of an express power on the point.[34]

On the basis of these precedents, and with a possible eye toward the preservation of private business from a form of competition which could well prove overwhelming if a contrary result had been achieved, the court in the instant case decided that the conduct of selling markers and monuments by the cemetery in question was *ultra vires.* From the standpoint of the overall picture with respect to cemetery operation, however, it may some day become necessary to permit cemeteries to have access to additional sources of revenue for income from perpetual care funds and the like may well prove inadequate to finance their proper upkeep and maintenance.

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[28] Dries v. Charles Evans Cemetery Co., 109 Pa. Super. 498, 167 A. 237 (1933). It should be noted that lot owners were not compelled to buy these vaults from the cemetery corporation.

[29] In State ex rel. Benson v. Lakewood Cemetery Ass'n, 197 Minn. 501, 267 N. W. 510 (1936), the court said this activity was strictly a service to the lot owners which could not be accepted or rejected.

[30] Wing v. Forest Lawn Cemetery Association, 15 Cal. (2d) 472, 101 P. (2d) 1099, 130 A. L. R. 120 (1940).

[31] Opinion of the Justices, 322 Mass. 755 at 758, 79 N. E. (2d) 883 at 886 (1948).

[32] People ex rel. Paxton v. Bloomington Cemetery Ass'n, 353 Ill. 534, 187 N. E. 455 (1933).

[33] Decatur Monument Co. v. New Graceland Cemetery Ass'n, 342 Ill. App. 692, 97 N. E. (2d) 570 (1951). It is not clear from the case that the cemetery was incorporated.

[34] Briggs v. Bloomingdale Cemetery Association, 113 Misc. 685, 185 N. Y. S. 348 (1920).

CHARITIES—CONSTRUCTION, ADMINISTRATION AND ENFORCEMENT—WHETHER IMMUNITY FROM TORT LIABILITY GRANTED TO CHARITABLE ORGANIZATION EXTENDS TO COMMERCIAL ENTERPRISES OWNED AND OPERATED BY THE CHARITY—The Supreme Court of Missouri, while refusing to revaluate the public policy supporting the general exemption from tort liability afforded to charities operating in that state, does appear to have established an important limitation thereon as the result of the decision attained in the recent case of *Blatt* v. *George H. Nettleton Home for Aged Women.*[1] The defendant therein, a duly constituted corporation for charitable purposes, owned and operated a four-storied building in downtown Kansas City, the total space of which it leased or rented to tenants, with all profit from such operation being used for the maintenance and operation of a home for aged women located elsewhere. Defendant maintained a common stairway in the downtown building in a negligent manner and plaintiff, a business invitee of one of the tenants, was injured while using such stairway. The trial court, on motion, dismissed plaintiff's petition to recover for the personal injury so sustained but, on plaintiff's appeal, the Supreme Court of Missouri reversed and remanded, holding that the use of the net profits from the operation of a commercial building in the maintenance and support of the charity's principal function did not entitle it to an immunity from liability arising out of its negligent operation of such building.

The court, sitting in one of the nine states which grant immunity to a charity on the ground of a public policy in favor thereof,[2] had to distinguish, in the case before it, between those activities which are considered charitable and those which are not. Other states have been confronted with this same problem and it has been held that the activity was

1 — Mo. —, 275 S. W. (2d) 344 (1955). Lozier, C., dissented from the report of the commissioners but the opinion of Coil, C., was adopted unanimously in a per curiam decision.

2 In general, see DeFeo and Spencer, "After Moore v. Moyle; Then What?" 29 CHICAGO-KENT LAW REVIEW 107 (1951), and annotation in 25 A. L. R. (2d) 29. But note that, since the foregoing were written, changes away from immunity have occurred in Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P. (2d) 220 (1951); Malloy v. Fong, 37 Cal. (2d) 356, 232 P. (2d) 241 (1951); Durney v. St. Francis Hospital, 7 Terry 350, 83 A. (2d) 753 (Dela., 1951); Noel v. Menninger Foundation, 175 Kan. 751, 267 P. (2d) 934 (1954); Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. (2d) 142, 56 So. (2d) 709 (1951); and Pierce v. Yakima Valley Mem. Hospital Ass'n, 43 Wash. (2d) 162, 260 P. (2d) 765 (1953). For new cases affirming immunity, see Forrest v. Red Cross Hospital, — Ky. —, 265 S. W. (2d) 80 (1954); Landgraver v. Emanuel Lutheran Charity Board, — Ore. —, 280 P. (2d) 301 (1955); Bond v. Pittsburgh, 368 Pa. 404, 84 A. (2d) 328 (1951); and Smith v. Congregation of St. Rose, 265 Wis. 393, 61 N. W. (2d) 896 (1953).

of a non-charitable nature, hence served as a basis for liability, where the charity was engaged in mining operations,[3] sold food,[4] or owned and operated an apartment house.[5] More closely allied with the instant holding are two cases from Mississippi and Tennessee in each of which the dependents of a person killed in the negligent operation of an elevator in a building owned by an educational institution, but used as an investment by the renting of space to tenants, were permitted to recover for the wrongful death.[6] In one of these cases, the Mississippi court said: "Where a charitable institution, or corporation, goes into an independent business, apart from its charity, not to be operated for any of its charitable purposes, but to be operated solely for profit, or to secure funds for its charitable purposes, it is liable for injuries as other corporations."[7] In much the same way, in North Carolina, a Masonic lodge was held not immune from an action for slander simply because it gave its net profits, derived from the operation of a motion-picture show, for the support of hospitals for crippled children.[8]

On the other hand, it has been held that a charitable institution organized for the purpose of sheltering neglected animals, while negligent in the conduct of operations performed by the institution pursuant to a contract with a city, was still entitled to immunity from liability on the ground that the compensation received was, in legal effect, no different than the contributions or donations it received either from persons directly benefited by its activities or from strangers.[9] In much the same way, the charging of a fee for the use of playground facilities[10] or the renting of bowling facilities[11] have been held not to be business activities within the meaning of the rule creating an exception from immunity as to charities engaged in performing business activities, so the issue involved in the instant case is not a settled one and the court concerned therewith admitted that each case would have to be approached on the basis of its peculiar facts.

An analogous problem may be found in those states which, like Illinois, hold that a charity is entitled to an immunity from liability on the basis

3 School Dist. v. Philadelphia, 367 Pa. 180, 79 A. (2d) 433 (1951).

4 Moran v. Plymouth Rubber Co. Mut. Ben. Assoc., 307 Mass. 444, 30 N. E. (2d) 238 (1940).

5 Pearlstein v. A. M. McGregor Home, 79 Ohio App. 526, 73 N. E. (2d) 106 (1947).

6 Rhodes v. Millsaps College, 179 Miss. 596, 176 So. 253 (1937); Gamble v. Vanderbilt University, 138 Tenn. 616, 200 S. W. 510 (1918).

7 Rhodes v. Millsaps College, 179 Miss. 596 at 621-2, 176 So. 253 at 256.

8 Turnage v. New Bern Consistory, 215 N. C. 798, 35 S. E. (2d) 8 (1946).

9 Siidekum v. Animal Rescue League, 353 Pa. 408, 45 A. (2d) 59 (1946).

10 Carpenter v. Y. M. C. A., 324 Mass. 365, 86 N. E. (2d) 634 (1949).

11 Wichner v. Y. M. C. A., 40 Luzerne Leg. Reg. 89 (Pa., 1945).

of a "trust fund" theory. Under this theory, trust property of the charitable organization cannot be taken to satisfy its liabilities for torts, but non-trust property may be so taken,[12] thereby making it necessary to distinguish between the two kinds of property[13] rather than the two types of operation performed. It has been said, in Tennessee, that the sole test to be used is one as to whether or not the property is subject to taxation[14] but in Illinois, independently thereof, it has been held that money collected as tuition by an educational institution would not lose its character as a trust fund[15] and one of the Appellate Courts of the state has held that money raised by assessment rather than by voluntary contribution from among the members of the charitable organization, if devoted to charitable uses, would also be exempt.[16] On the other hand, in Tennessee, the immunity has been held not to extend to property held or employed in an effort to earn or provide funds for carrying on the work of charity,[17] so that carnival equipment, as well as sums of money accumulated from the operation thereof, may be taken on execution issued under a judgment sounding in tort.[18]

Since it has been uniformly held, in states following the "trust fund" theory, that the proceeds of liability insurance carried by the charity do not constitute trust property, hence may be appropriated to the satisfaction of a judgment,[19] there is reason to believe that assets of a purely commercial character should also be placed in the non-trust category. The entire problem could be avoided, however, if the growing tendency to discard all immunity for charitable institutions was universally accepted and complete responsibility was placed upon them for their torts or the torts of their agents.

F. S. RODKEY, JR.

[12] Moore v. Moyle, 405 Ill. 555, 92 N. E. (2d) 81 (1950); Anderson v. Armstrong, 180 Tenn. 56, 171 S. W. (2d) 401 (1943).

[13] For further discussion on this and related matters, see notes in 30 CHICAGO-KENT LAW REVIEW 186 and 31 CHICAGO-KENT LAW REVIEW 279.

[14] Anderson v. Armstrong, 180 Tenn. 56, 171 S. W. (2d) 401 (1943).

[15] Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991 (1905).

[16] Slenker v. Gordon, 344 Ill. App. 1, 100 N. E. (2d) 354 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 186.

[17] Baptist Mem. Hospital v. Couillens, 176 Tenn. 300, 140 S. W. (2d) 1088 (1940).

[18] Hammond Post American Legion v. Millis, 179 Tenn. 226, 165 S. W. (2d) 78 (1942).

[19] O'Connor v. Boulder Colo. Sanitarium Assoc., 105 Colo. 259, 96 P. (2d) 835 (1939); Moore v. Moyle, 405 Ill. 555, 92 N. E. (2d) 81 (1950); Baptist Mem. Hospital v. Couillens, 176 Tenn. 300, 140 S. W. (2d) 1088 (1940).

CRIMINAL LAW—CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME —WHETHER AN ACCUSED PERSON IS RESPONSIBLE IN THE EVENT HIS UNLAWFUL ACT IS THE PRODUCT OF A MENTAL DEFECT OR DISEASE NOT AMOUNTING TO INSANITY—Following upon the presentation of the testimony in the recent case of *Durham* v. *United States*,[1] the federal judge, sitting without a jury, convicted the defendant of housebreaking[2] despite testimony offered on the latter's behalf to the effect that he was of unsound mind at the time of the offense. The United States Court of Appeals for the District of Columbia was then asked, upon review of the conviction so obtained, to adopt a "mental disease or mental defect" test to be applied in determining criminal responsibility on the ground that existing tests on the point were obsolete and should be liberalized. That court heeded the request and held that, in the event a defendant's unlawful act is the product of mental disease or mental defect, even though the mental condition is not the equivalent of insanity as generally defined, he is not to be regarded as criminally responsible. On this basis, the trial court decision was reversed and the case was remanded for new trial.

Although at least one court has expressed the opinion that there is no workable test for the determination of capacity to commit a crime,[3] the majority of jurisdictions believe there are tests which can be applied by a jury to the facts of a particular case to determine whether or not an accused person was sane enough to be legally responsible for his acts. The formulation and application of these tests for determining criminal responsibility is not something novel to the twentieth century for, early in the common law, a person was excused from his criminal acts if he was found to be totally deprived of reason, understanding and memory, and did not know what he was doing any more than would a wild beast.[4] Later, if a man lacked the capacity and understanding of a normal child of fourteen years, he was deemed irresponsible,[5] but these early rules were superseded, in 1843, by what is generally termed the "right and wrong" tests as laid down in the landmark *M'Naghten's Case*.[6] There, in answer to certain questions propounded in the House of Lords as to the effect of

1 214 F. (2d) 862 (1954). Following reversal, the case was retried and the report of retrial appears in 130 F. Supp. 445 (1955). See also the related case of Stewart v. United States, 214 F. (2d) 879 (1954).

2 D. C. Code 1951, §§ 22-2201 and 22-2202.

3 State v. Jones, 50 N. H. 369, 9 Am. Rep. 242 (1871).

4 Rex. v. Arnold, 16 How. St. Tr. 695 (1724); People v. Schmidt, 216 N. Y. 324, 110 N. E. 945 (1915). In order to have the advantage of this rule, the accused had to be either a raving maniac or he was considered as if completely sane. Promulgated before the advent of psychiatric research, the subject has never been limited in this country to this test alone because of its patent severity.

5 Hale, P. C., p. 136.

6 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843).

insanity in relation to responsibility for criminal acts, the judges proclaimed that a man would be presumed sane, hence be held responsible for a crime, until the contrary was proved to their satisfaction. As a consequence, in order to establish the defense of mental incapacity, the party was obliged to prove that, at the time of committing the act, he was laboring under such a defect of reason as not to know the nature and quality of the act he was doing; or, if he did know, that he did not know that he was doing wrong.

Some courts have construed this rule as referring to the ability to distinguish between rightful and wrongful conduct in general[7] but this is not the majority opinion as to the construction of the rule[8] for the prevailing view is that the capacity of the accused to distinguish right from wrong must be with respect to the specific crime at the time of its commission and not as to some abstract capacity.[9] Under this view, therefore, it is possible that the accused may be considered sane on all subjects except the one concerned in his prosecution yet, if he is unable to distinguish right from wrong as to that, his defense is complete. On the other hand, if he has knowledge and consciousness that the act he is doing is wrong and that he will deserve punishment if apprehended, he is sane and guilty regardless of mental weakness.[10]

In addition, a number of jurisdictions have supplemented the right and wrong test with a so-called "irresistible impulse" test.[11] An irresistible impulse has been said to be one "induced by, and growing out of some mental disease affecting the volitive, as distinguished from the perceptive, powers so that the person afflicted, while able to understand the nature and consequence of the act charged against him and to perceive that it is wrong, is unable, because of such mental disease, to resist the impulse to do it."[12] Irresistible impulse, to be distinguished from a mere passion or an overwhelming emotion not connected with a diseased mind, has a

[7] Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634 (1869); Jolly v. Commonwealth, 110 Ky. 190, 61 S. W. 49 (1901); State v. Bundy, 24 S. C. 439, 58 Am. Rep. 262 (1825).

[8] 14 Am. Jur., Criminal Law, § 40, p. 796.

[9] Boswell v. State, 63 Ala. 307 (1879); Armstrong v. State, 30 Fla. 170, 11 So. 618 (1892); People v. Geary, 298 Ill. 236, 131 N. E. 652 (1921); Hornish v. People, 142 Ill. 620, 32 N. E. 677 (1893); State v. Knight, 95 Me. 466, 50 A. 267 (1902); State v. Roy, 40 N. M. 397, 60 P. (2d) 646 (1936); Flanagan v. People, 52 N. Y. 467 (1873).

[10] In People v. Marquis, 344 Ill. 261, 176 N. E. 314 (1931), it was held that subnormal mentality would not be a defense to crime unless the accused was unable to distinguish between right and wrong with respect to the particular crime. See also 14 Am. Jur., Criminal Law, § 40, p. 796.

[11] Smith v. United States, 36 F. (2d) 548 (1929); Meyer v. People, 156 Ill. 126, 40 N. E. 490 (1895); Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231 (1863).

[12] 27 L. R. A. (N. S.) 461, at 466, contains a collection of cases in point. See also Dunn v. People, 109 Ill. 635 (1884), and L. R. A. 1918D 794.

classic illustration in the form of the case of the kleptomaniac[13] but it is not uncommon to confuse irresistible impulse with emotional, or moral, insanity and also with the right and wrong test. Further confusion has arisen from a tendency to attempt to use the irresistible impulse test and the right and wrong test conjunctively so there is some doubt as to whether a court will give the accused a choice between these tests when building his defense or will require that the mental condition of the accused satisfy both of them.[14] To allay some of this confusion, at least one state has ruled out the irresistible impulse test by statute,[15] another has not yet decided whether to recognize it or not,[16] while still another has rejected it by court decision[17] on the ground it gives too great an immunity to the accused.

Of all the tests used for determining criminal responsibility, the most widely accepted one is the right and wrong test for it has been used in all parts of the country except for Rhode Island, where the court has never passed on the question, and New Hampshire, where it is sometimes said that no legal test of irresponsibility by reason of insanity exists. In the last-mentioned jurisdiction, criminal responsibility is left as a question of fact for the jury with the jury determining whether the defendant possessed a mental disease and, if so, whether it was of such a character or degree as to take away the capacity to form a criminal intent.[18] While the New Hampshire view has been criticized as placing too great a burden upon the jury without providing sufficient guides to assist it,[19] the criticism does not seem to be valid for a jury is more likely to be able to determine criminal responsibility under a flexible standard than if it were guided by the result of long and involved hypothetical questions as well as complicated instructions purporting to explain the right and wrong test or the irresistible impulse test. In addition, it would be no more difficult for a jury to determine whether the act was the product of a mental disease or mental defect than it would be for them to decide

13 Harris v. State, 18 Tex. Cr. App. 287 (1885).

14 Several New York cases noted in an annotation in 70 A. L. R. 680 illustrate this point. See also People v. Varecha, 353 Ill. 52, 186 N. E. 528 (1933); People v. Geary, 298 Ill. 236, 131 N. E. 652 (1921).

15 N. Y., Penal Code, § 34. See also People v. Silverman, 181 N. Y. 235, 73 N. E. 980 (1905).

16 In Missouri, for example, there would appear to be an absence of uniformity for, in Baldwin v. State, 12 Mo. 223 (1848), the court expressly accepted the irresistible impulse test while, in State v. Handley, 46 Mo. 414 (1870), the test was rejected.

17 Simeck v. State, 243 Wis. 439, 10 N. W. (2d) 161 (1943); Osborn v. State, 143 Wis. 249, 126 N. W. 737 (1910); State v. Wilner, 40 Wis. 304 (1876).

18 State v. Jones, 50 N. H. 369, 9 Am. Rep. 242 (1871).

19 Guttmacher and Weihofen, Psychiatry and the Law (W. W. Norton & Co., New York, 1952), p. 419.

whether the accused knew the difference between right and wrong or had acted as the result of an irresistible impulse.

The rule adopted in the instant case, probably stemming from a gathering dissatisfaction with older views on the subject, is substantially the same as the New Hampshire rule in that the jury is hereafter to be instructed that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[20] True, no standard has been furnished for measuring how serious the mental disease must be to relieve the defendant of responsibility but, under this view, a degree of flexibility is present for the jury is permitted to consider every aspect of the defendant's mental condition. The decision in the instant case, therefore, represents a more enlightened concept as to criminal responsibility than the one displayed by the same court which, less than ten years ago, had flatly rejected the doctrine of partial responsibility.[21]

It is possible, under this new test, that a great many more defendants may be found not responsible for their criminal acts than were so found under other tests. Nevertheless, there has long been need for a more enlightened test to be applied in accordance with modern scientific principles of psychiatry[22] so the abandonment of the terminology of earlier standards for determining insanity and the substitution, in lieu thereof, of modern language consistent with psychiatric and psychological concepts should result in some good.

S. M. SCHOENBURG

CRIMINAL LAW — LIMITATION OF PROSECUTIONS — WHETHER, UNDER TIMELY INDICTMENT FOR FELONY, ONE CONVICTED ON INCLUDED MISDEMEANOR MAY ASSERT LIMITATION DEFENSE APPLICABLE TO MISDEMEANOR CHARGE—In the recent West Virginia case of *State* v. *King*,[1] the defendant was prosecuted on indictment for the felony of malicious and unlawful wounding[2] but, on jury verdict, was found guilty only with respect to a

20 214 F. (2d) 862 at 875.

21 Fisher v. United States, 149 F. (2d) 28 (1945).

22 Glueck, Mental Disorder and the Criminal Law (Little, Brown & Co., Boston, 1925), at p. 136, states: "If legal tests must needs be provided (and with the system of trial by jury the use of some test is better than to leave the matter entirely open), they should be applied only after the general mental condition of the defendant, as manifested by his mental and environmental history, physical and mental examination, and psychological-psychiatric study . . . have first been placed before the jury in an intelligent, clear, unbiased report."

1 — W. Va. —, 84 S. E. (2d) 313 (1954). Given, P., wrote a dissenting opinion in which Haymond, J., concurred.

2 W. Va. Code 1949, § 61-2-9, provides, in part, that if "any person maliciously shoot, stab, cut or wound any person, or by any means cause him bodily injury with intent to maim, disfigure, disable or kill, he shall . . . be guilty of a felony."

misdemeanor for assault and battery. He then moved to arrest judgment on the ground the indictment, while presented in apt time for the felony charge, had been returned too late to support a prosecution for a misdemeanor.[3] The trial court, nevertheless, denied the motion and entered judgment sentencing the defendant to a period of imprisonment in the county jail. On writ of error to reverse this judgment, the Supreme Court of Appeals of West Virginia, two judges dissenting, reversed the lower court decision and ordered the defendant discharged, when it held that, despite the fact the indictment had been presented within the time allowed for a felony prosecution, the defendant could not be held to answer for a lesser offense, even one included in the greater charge, unless the indictment had also been filed within the period fixed by law for prosecution of the lesser offense.

It is the general rule of the criminal law that, where the offense charged in the indictment includes within it another offense of lower degree, the defendant may be convicted for the lesser offense even though the evidence should fail as to the offense of higher degree.[4] Where the offense for which the defendant is indicted includes within it a lesser offense as to which a differing period of limitation would be applicable, the problem here presented may arise provided the indictment has been returned in ample time for the more serious crime but after the expiration of the limitation period as to the lesser offense. This problem has been resolved in one of two ways but for a variety of reasons. The general rule to be followed in such cases would appear to be one under which the person indicted for the compound offense is entitled to be discharged.[5] Thus, in the event the charge of felony includes an offense of lower grade with a different period of limitation, but the lesser offense is abated, the bar cannot be evaded by indicting the defendant for the felony and thereafter convicting him on the lesser offense.[6] Nevertheless, there

[3] Ibid., § 61-11-9, provides, in part, that a "prosecution for a misdemeanor shall be commenced within one year after the offense was committed."

[4] Watson v. State, 116 Ga. 607, 43 S. E. 32 (1902); State v. Phinney, 13 Ida. 307, 89 P. 634 (1907); Earll v. People, 73 Ill. 329 (1874); People v. Dugas, 310 Ill. 291, 141 N. E. 769 (1923); and Davis v. State, 39 Md. 355 (1873), are typical of the cases so holding. In addition, a number of states possess special statutory provisions to the same effect.

[5] See 22 C. J. S., Criminal Law, § 225b, p. 355.

[6] In addition to the instant case, see Letcher v. State, 159 Ala. 59, 48 So. 805 (1909); People v. Picetti, 124 Cal. 367, 57 P. 156 (1902); People v. Angelo, 24 Cal. App. (2d) 626, 75 P. (2d) 614 (1938); Drott v. People, 71 Colo. 383, 206 P. 797 (1922); Mitchell v. State, 157 Fla. 121, 25 So. (2d) 73 (1946); Church v. People, 10 Ill. App. 222 (1881); People v. Burt, 51 Mich. 199, 16 N. W. 378 (1883); Riggs v. Mississippi, 30 Miss. 635 (1856); State v. Atlas, 75 Mont. 547, 244 P. 477 (1926), not directly but by inference and reference to cases so holding; People v. DiPasquale, 161 App. Div. 196, 146 N. Y. S. 523 (1914); Hickey v. State, 131 Tenn. 112, 174 S. W. 269 (1915); McKinney v. State, 96 Tex. Cr. R. 342, 257 S. W. 258 (1924); and 15

have been minority holdings to the effect that the limitation period applicable is that which relates to the offense charged in the indictment, not that which relates to any minor offense for which the accused might have been convicted under that indictment, particularly so (1) where the statute specifically so states, or (2) where the statute can be construed to so intend, either from the generality of its language or because of some specific wording.[7]

In many of the cases which follow the general rule, courts have rested their determination on no more than a naked asseveration that the statute of limitations is enough to prevent a conviction for the lesser included offense. Where such courts have reasoned over the point, the conclusion has been reached on the basis that the statutes of limitation are to be construed liberally in favor of the defendant; that to prevent the operation of the statute by charging a crime of higher grade not within the bar would operate to nullify the statute;[8] that what could not be done directly could not be sanctioned by indirection;[9] or that, to hold otherwise, would make it possible to destroy the beneficient purpose of the statute by the simple device of indicting a defendant for a felony and then proving up no more than the outlawed lesser offense.[10] It has also been suggested that, if this type of action were to be permitted, there would, in effect, be no statute of limitations which could be invoked by a defendant.[11]

Further support for the majority view has been said to rest on the fact that, where the statute has run against the lesser offense, the latter ceases to be actionable or punishable[12] and it is the finding of the jury and not the charge in the indictment which should be considered as

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Am. Jur., Criminal Law, § 343, p. 33. In Louisiana, the majority rule would now seem to prevail under the holding in State v. Brosette, 163 La. 1035, 113 So. 366 (1927), but see State v. McGee, 167 La. 277, 119 So. 48 (1928), to the effect that an indictment for the highest grade of offense might interrupt the prescription for each lesser offense of the same class. Oklahoma has not yet directly passed on the issue but, in State v. Osborn, 86 Okla. Cr. R. 259, 194 P. (2d) 176 (1948), a dissenting judge, without giving reasons, favored the majority view.

7 The minority view is revealed, in addition to cases hereinafter cited, through the medium of the holdings in Wall v. State, 75 Ga. 474 (1885); Clark v. State, 12 Ga. 350 (1852); Reynolds v. State, 1 Ga. 222 (1846); Sikes v. State, 20 Ga. App. 80, 92 S. E. 553 (1917); Troup v. State, 17 Ga. App. 387, 87 S. E. 157 (1915); People v. Dowling, 1 N. Y. Cr. 529 (1884); and Carden v. State, 40 Tenn. (3 Head) 267 (1859). The last mentioned case was overruled by the decision in Turley v. State, 50 Tenn. (3 Heisk.) 11 (1870).

8 Drott v. People, 71 Colo. 383, 206 P. 797 (1922).

9 State v. Cobbs, 7 La. Ann. 107 (1852).

10 People v. Gray, 131 Cal. 267, 70 P. 20 (1902).

11 People v. Picetti, 124 Cal. 361, 57 P. 156 (1902).

12 Letcher v. State, 159 Ala. 59, 48 So. 805 (1909); Speare v. State, 26 Ala. App. 376, 160 So. 727 (1935); People v. DiPasquale, 161 App. Div. 176, 146 N. Y. S. 663 (1914).

conclusive in relation to the character of the offense.[13] Thus, in the event a defendant should be indicted for a felony but convicted only for a misdemeanor, the offense would have to be deemed as being a misdemeanor *ab initio*[14] which, being no longer punishable or actionable, would leave the court without jurisdiction to try the offense, thereby making the conviction void.[15]

In addition, a fourth argument, discussed at greatest length in the Florida case of *Mitchell* v. *State*,[16] is based on the assumption that to punish for a lesser included offense on which the time limitation had run would involve a violation of constitutional doctrines concerning due process as well as relating to equal protection of laws. In that case, a defendant had been indicted for the felony of first degree murder but had been convicted for second degree murder, on which offense the period of limitation had run. The court held that, as the defendant had been adjudged not guilty of murder in the first degree, he was entitled to every benefit to which any one else could be entitled who was guilty of no more than murder in the second degree. Such a person being guaranteed all the rights, privileges, and immunities flowing from the law to everyone else under a like state of facts, this right of equal protection was not to be taken away by the state's choosing to proceed with a prosecution under some method which would deprive the defendant of the benefit of the statute of limitations where, had the state chosen to proceed in the normal fashion, the statute would be available.[17] It was no answer to say that the statute applied equally to all in the like situation, *i.e.*, to those similarly indicted, because all men were deemed innocent before the law until adjudged guilty by a court of competent jurisdiction. Accordingly, a statute which purported to specifically allow conviction for the lesser

13 State v. Cobbs, 7 La. Ann. 107 (1852).

14 In People v. Weaver, 56 Cal. App. (2d) 732, 133 P. (2d) 818 (1943), a distinction was drawn between cases where the indictment was for a felony and the conviction was for a lesser offense and those cases where the crime described in the indictment could have been either a felony or a misdemeanor. In the first situation, the offense is considered to be a misdemeanor "*ab initio*." The distinction cited is similarly to one made in State v. Atlas, 75 Mont. 547, 244 P. 477 (1926).

15 See Speare v. State, 26 Ala. App. 376, 160 So. 747 (1935). In Riggs v. Mississippi, 30 Miss. 635 (1856), where the statute was to the effect that no person should be prosecuted, tried, or punished for any offense, willful murder, excepted, unless the indictment, presentment, or information for the same had been found or exhibited within one year next after the offense had been committed, the court held that it was competent for the defendant to be tried for murder but that, if the jury gave a verdict for manslaughter and found that the offense had been committed over one year before the charge was filed, the prisoner, in the language of the statute, could not be punished, so a motion in arrest of judgment would have to be sustained.

16 157 Fla. 121, 25 So. (2d) 73 (1946).

17 In People v. Miller, 12 Cal. 291 at 295 (1859), the court said: "We cannot hold that the condition of the defendant under the more general indictment is any worse than if the indictment were for the precise and specific offense."

offense even though the statute of limitations had run against it,[18] was declared to offend against the due process and equal protection provisions of the state[19] and the federal constitutions.

Related to the foregoing is an argument advanced in the instant case, one to the effect that a statutory provision authorizing a conviction for a lesser included offense is to be considered as nothing more than a convenient rule of pleading, a device to do away with the necessity for elaborate specification as to every lesser degree of offense or attempt to commit the criminal act.[20] As no mere act of the pleader could deprive the accused of any defense which he possessed, it likewise could not operate to confer any greater right upon the prosecution than would be possessed had the offense been properly charged as a misdemeanor.[21]

To these arguments might be added a sixth, one proceeding on moral rather than legal grounds. There is indication that courts holding to the majority rule have, as in the instant case, expressed a degree of concern over the temptation which would be held out by an opposite view to an unscrupulous grand jury or prosecuting attorney. While it is a legal maxim that *omnia praesumuntur rita esse acta,*[22] a maxim particularly applicable to public officials, the fact remains that some might yield to this temptation, hence it would be better to remove the same before any one could yield thereto.[23] By learning that nothing could be gained by yielding, it was hoped that, on this as well as other grounds enumerated, defendants likely to be charged in the manner revealed in the instant case would be proteeted.

The minority view on the subject, when not resting upon a statute specifically declaring that the statute of limitations should not be construed as having run against a lesser included offense, has generally been founded on narrow and technical arguments. It has, for example, been

18 Fla. Stat. Ann. 1946, Vol. 2, Ch. 932, § 932.05, stated that, in the trial on an indictment charging a capital offense, "a verdict may be returned for an offense less than capital which may be included within such indictment, although the indictment may have been found more than two years after commission of the offense embraced in such verdict."

19 Fla. Const. 1868, Declaration of Rights, §§ 1 and 12.

20 See also the case of People v. DiPasquale, 161 App. Div. 196, 148 N. Y. S. 523 (1914), cited in the instant case.

21 Church v. People, 10 Ill. App. 222 (1881).

22 This maxim is generally translated to mean that all things are presumed to have been rightly done.

23 In Wilson v. State, 15 Tenn. (7 Yerg.) 516 at 517 (1835), the court said: ". . . prosecutions for assaults and batteries might be got up at any distance of time provided a grand jury could be induced to find a bill for an assault with intent to kill. A temptation would be held out, too, to prosecutors to commit perjury, in order to get such indictments found that thereby the Statute of Limitations may not operate."

content to rely on the statement that the statute which applies is the one which relates to the offense charged in the indictment. For this purpose, it has been concerned with the narrow limits provided by such words as "prosecution" or "indictment," treating the statute providing for a limitation period with respect to a misdemeanor as being inapplicable in cases where the prosecution or indictment charged a felony, even though the conviction was for a lesser offense. This is the argument advanced by the Georgia cases which are most often cited for the minority view[24] and, no matter how inequitable the result, it has been said that it was the duty of the court to follow the language of the statute.[25] This argument, carried to its greatest length in the dissent in the instant case, would require that the statute fixing a time limit on prosecutions for misdemeanors[26] should be read as being *in pari materia* with any special statutory provision which might authorize a person indicted for a felony to be acquitted in part yet be convicted in part on the offense charged and be sentenced by the court on the part for which he was convicted, provided the same was substantially charged in the indictment, whether that part be a felony or a misdemeanor.[27] When so read together, the case was said to be a prosecution for a felony, hence not within the majority rule.

By way of an attempt to meet the argument based on constitutional requirements as to equal protection and due process, the suggestion has been made by minority proponents that the defendant has not been deprived of any substantial rights, provided he has enjoyed all the rights and privileges incident to a proper trial for the crime on which he was indicted,[28] since statutes of the kind in question merely provide for a procedural change, and no defendant has a vested right in any particular remedy.[29] Again, regarding these statutes as being mandatory in their language,[30] and not simply evocative of a rule pertaining to matters of

[24] The argument appears to have been first advanced in Reynolds v. State, 1 Ga. 222 (1846), but was reinforced by the holding in Clark v. State, 12 Ga. 350 (1852).

[25] People v. Dowling, 1 N. Y. Cr. 529 (1884).

[26] The W. Va. statute is set out in note 3, ante.

[27] W. Va. Code 1949, § 62-3-14. The dissenting judge relied on another West Virginia case, that of State v. Smith, 130 W. Va. 183, 43 S. E. (2d) 802 (1947), for support for the argument that, under this section, the return of a misdemeanor verdict did not alter the fact that, on an indictment drafted pursuant to ibid., § 61-2-9, the prosecution had to be regarded as a felony prosecution.

[28] Clark v. State, 12 Ga. 350 (1852).

[29] See the dissenting opinion in Mitchell v. State, 151 Fla. 121, 25 So. (2d) 73 (1946).

[30] Except as found in W. Va. Code 1949 § 62-3-14, the word "shall" in a statutory provision relating to conviction for a lesser included offense does not re-appear in any other jurisdiction. The statutes involved in the cases of Speare v. State, 26 Ala. App. 376, 160 So. 727 (1935); Presnal v. State, 23 Ala. App. 578, 129 So. 470 (1930); Letcher v. State, 159 Ala. 59, 48 So. 805 (1909); Perry v. State, 103 Fla. 580, 137 So. 798 (1931); Fuecher v. State, 33 Tex. Cr. R. 22, 24 S. W. 292 (1893);

pleading, the contrast is sharply drawn, particularly since, in the absence of a statute, no defendant would be able to escape prosecution simply because of a lapse in time.[31]

The instant case is the more noteworthy because it is more comprehensive in its discussion of the minority holding rather than of the majority, but its value lies in the way in which it shows up the minority's attempt to make the worse appear to be the better reason. To argue that the statute of limitations to be applied is simply that which relates to the offense charged in the indictment, and not that which relates to the lesser included offense on which the defendant is convicted, is clearly to deprive the defendant of a substantial right. Statutes which purport to so declare should be held unconstitutional and the strict construction of other statutes so as to permit of the same effect should be rejected as an attempt to nullify the very purpose for which statutes of limitation have been enacted.

MISS M. CULHANE

CRIMINAL LAW — TRIAL — WHETHER DEFENDANT POSSESSES AN INVIOLATE RIGHT TO POLL JURY FOLLOWING RETURN OF VERDICT — A recent decision of the Supreme Court of Tennessee provides opportunity to note both historical highlights as well as prevailing attitudes concerning a right incident to trial by jury, that of polling the jury following the return of verdict, which has heretofore received scant attention. In the case of *Voss* v. *Tennessee*,[1] the defendant, following upon a conviction for murder, sought review and among other things urged that reversible error had occurred by reason of a failure on the part of the trial court to poll the

and White v. State, 4 Tex. App. 488 (1878), did, however, specifically provide for conviction on the lesser included offense. In People v. Burt, 51 Mich. 199, 16 N. W. 378 (1883); People v. DiPasquale, 161 App. Div. 196, 146 N. Y. S. 523 (1914); and in Hickey v. State, 131 Tenn. 112, 174 S. W. 269 (1915), the statutes construed were in permissive form. In only one instance, mentioned in Hickey v. State, 131 Tenn. 112, 174 S. W. 269 (1915), does it appear that the legislature was conscious of the problem posed in the instant case and specifically provided that the one-year limitation as to misdemeanors was to apply even though the prosecution rested on an indictment charging a felony.

31 The moral argument mentioned above has been by-passed with the suggestion that it is a matter for the legislature to consider, not one for the courts, and might well have been one which the legislature, at the time of the enactment of legislation, probably had in mind.

1 — Tenn. —, 270 S. W. (2d) 644 (adv.) (1954). All judges concurred, both as to the initial decision and the action taken on a petition for rehearing which asserted that the court had failed to respond to the petitioner's contention that rights guaranteed by the federal constitution had been violated. For some undisclosed reason, the opinion of the court does not appear in the bound volume in 270 S. W. (2d) 644 and the space has been devoted to an unrelated Texas case which has been interpolated.

jury although a seasonable request had been made by counsel for the defendant.[2] Contention was made that this failure was, in effect, a denial of a constitutional right. The conviction was affirmed when the court said there was nothing in constitutional mandate[3] which gave the defendant an absolute right to have the jury polled, but that the matter was, rather, one to be addressed to the sound discretion of the trial judge[4] which discretion had not been abused.

There is long standing support in at least two jurisdictions for the view that a poll of the jury is not a matter of absolute right and that, when the jury have openly, deliberately, and unanimously assented to the verdict after being called upon for that purpose, this affords all the evidence of unanimity which could reasonably be required.[5] The cases in point, however, are somewhat weakened since the manner in which the verdict was rendered afforded the jurors an opportunity to register objection to the verdict when the court, following announcement of the verdict, asked the question "So say you all?"

Any doubt on the point of the defendant's right to poll the jury or as to the placing of this right within the discretion of the court,[6] hence not reviewable unless a clear and flagrant abuse of that discretion exists,[7] appears to stem from a statement in Sir Matthew Hale's celebrated work entitled Pleas of the Crown. Ascribing the procedure to the era of Edward III, he wrote: "If the jury say they are agreed, *the court may* examine them by poll; and if in truth they are not agreed they are fineable."[8] Although often quoted by courts and textwriters, it is believed that some liberties have been taken in the interpretation of this statement, as would appear from the Colorado case of *Ryan* v. *People*[9] wherein counsel for the defendant was absent from the court at the time the

2 The trial judge appears to have expressed the view that when the verdict was announced and he asked the jury "So say you all, gentlemen of the jury?" it meant "everyone of you." As all jurors answered in the affirmative, he believed this obviated the necessity of making an individual poll of each of the jurors. The latter method is the one most commonly used.

3 Tenn. Const. 1870, Art. I, § 6, does declare that the right to "trial by jury shall remain inviolate."

4 Reliance by the defendant on the Fifth and Fourteenth Amendments to the United States Constitution was rejected when the court stated that the Fifth Amendment operated exclusively on the federal courts and any right to poll the jury was not an element of due process which could be said to be guaranteed by the Fourteenth Amendment.

5 State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89 (1880); In re Fellows, 5 Me. 333 (1828).

6 State v. Daniel, 77 S. C. 53, 57 S. E. 639 (1907); State v. Wyse, 32 S. C. 45, 10 S. E. 612 (1890).

7 State v. Sousa, 43 R. I. 176, 110 A. 603 (1920).

8 2 Hale, P. C., 299. Italics added.

9 50 Colo. 99, 114 P. 306 (1911).

verdict was read and no poll was requested but it was held that no substantial right of the accused had been denied since the matter of polling the jury lay in the discretion of the court to exercise if, for any reason, the court experienced a doubt as to the unanimity of the verdict. Prior to the instant case, the New Hampshire case of *State* v. *Grierson*[10] provided the most recent confirmation of this view for it was there said that a refusal to accede to a request to poll the jury in a capital case was not sufficient cause for review.

Inasmuch as the whole subject, viewed in retrospect, appears to be clouded with uncertainty, it is not surprising to note that a second theory, diametrically opposed to the first, has developed. This theory is well illustrated by the leading case of *Tilton* v. *State*[11] where the Georgia Supreme Court, sustaining an exception to a trial court refusal to grant a new trial, insisted that the defendant's right to demand a jury poll was a legal right not dependent upon the discretion of the court.[12] It has, therefore, been held to be reversible error for the trial judge to refuse a defendant's request for a jury poll even in those cases where the jury has returned a sealed verdict.[13]

As might be expected, in those jurisdictions which recognize an absolute right on the part of the defendant to poll the jury, the manner of polling must conform to more exacting rules of procedure, particularly on the point that the defendant must have an opportunity to question each individual juror as to his assent to the verdict, so that polling the jurors in "concert" would be in error.[14] It is not essential, however, that the required assent of each juror to the verdict as rendered by the foreman should be placed in formal or literary style, provided the assent is unmistakable in meaning.[15] When, therefore, the jurors have answered

[10] 96 N. H. 36, 69 A. (2d) 851 (1949).

[11] 52 Ga. 478 (1874).

[12] Where an absolute right to poll the jury is accorded to defendant, a similar right is also granted to the prosecution: Cowart v. State, 147 Ala. 137, 41 S. 631 (1906); Feddern v. State, 79 Neb. 641, 113 N. W. 127 (1907).

[13] Stewart v. People, 23 Mich. 63, 9 Am. Rep. 78 (1871).

[14] Blankenship v. State, 112 Ga. 402, 37 S. E. 732 (1900). In the recent case of State v. Thursby, — Mo. —, 245 S. W. (2d) 859 (1952), the defendant requested that the jury be polled but failed to object when the court did not conduct an individual poll. The higher court reversed the conviction on other grounds but, while recognizing the right of the defendant to a poll of the jury, indicated that a failure to object to a poll "in concert" could well be a waiver of the right to an individual poll.

[15] Heize v. State, 184 Md. 613, 52 A. (2d) 128 (1945); Commonwealth v. Buccieri, 153 Pa. 535, 26 A. 228 (1893). But see State v. Austin, 6 Wis. 205 (1855), wherein one juror, on poll, refused to answer with a "yes" or "no" but rather said "I subscribe to it." The trial court refused to accept this answer and insisted upon a categorical statement in the affirmative or negative, whereupon the juror said "yes." The Wisconsin Supreme Court reversed the conviction, saying that, when a juror expressed discontent with the verdict, the judge should respect this opinion and refuse to accept the verdict.

"Yes," "Yes, sir," or "It is," in response to the direct question, the right to a poll has been said to be fully satisfied.[16] It is not proper, according to the case of *State* v. *Boger*,[17] to ask each juror who voted for the verdict to stand as the defendant is entitled, as a matter of right, to have verbal assent to the verdict announced. It was there said that "to poll" meant to ascertain by direct question addressed to each juror individually whether he assented and still did assent to the verdict. Naturally, the request to poll must be timely and come before the recording of the verdict[18] for a failure to make a seasonable request could result in a waiver of the right,[19] even where counsel was absent at the time, provided no explanation for the attorney's absence was given.[20]

Illinois must be included among those jurisdictions which consider that the defendant has an inviolate right to poll the jury if it can be presumed that present-day courts will follow a decision rendered as far back as 1825 in the case of *Nomaque* v. *People*.[21] The Supreme Court there held that the jury had to be present in court at the time the verdict was rendered in order that the accused might exercise his right to poll the jury. Since that date, no Illinois decision in a criminal case appears to have considered the problem but, in view of the century and more of unquestioned practice, as well as the weight of the majority view elsewhere, the presumption appears to be a reasonable one.

To obviate any confusion or ambiguity which might result from the two mutually antagonistic theories aforementioned, some twenty-five jurisdictions have enacted appropriate legislation clarifying the practice with respect to criminal trials.[22] Typically, these statutes provide that, upon the rendition of the verdict, the jury may be polled at the instance of

16 State v. Meyers, 7 N. J. 465, 484, 81 A. (2d) 1171 (1951).

17 202 N. C. 702, 163 S. E. 877 (1932).

18 Taylor v. State, 138 S. E. 83 (Ga. App., 1927).

19 Bridges v. State, 154 Miss. 489, 122 So. 533 (1929).

20 People v. Schneider, 28 N. Y. Crim. R. 473, 139 N. Y. S. 104 (1912).

21 1 Ill. (Breese) 145 (1825). The court relied on prior civil cases for support of this holding but justified the position it took on the theory that it was certainly not less important to grant a similar right to a defendant in a criminal prosecution.

22 Ark Stat. Ann. 1947, § 43-2160; Ariz. Code Ann. 1939, § 44-1912; Deering Cal. Penal Code 1941, § 1163; Fla. Stat. Ann. 1941, § 919.10; Ida. Code Ann. 1946, § 19-2316; Burns Ind. Stat. Ann. 1933, § 9-1811; Iowa Code Ann. 1946, § 785.15; Carroll's Ky. Crim. Code of Prac. 1948, § 267; La. Rev. Stat. 1950, § 15.416; Minn. Stat. Ann. 1943, § 631.16; Mont. Rev. Code 1947, § 94.7416; Neb. Rev. Stat. 1943, § 29-2024; Nev. Comp. Laws 1929, § 11021; McKinney Consol. Laws N. Y., Penal Code, § 450; N. D. Rev. Code 1943, § 29-2213; Page's Ohio Gen. Code 1938, § 13448.5; Okla. Stat. Ann. 1936, § 22.921; Ore. Stat. 1941, Ch. 22, § 921; Vernon Tex. Code Crim. Pro. 1925, Art. 691; Utah Code Ann. 1953, § 77-33-10; Wyo. Comp. Stats. 1945, § 10-1401. See also Dela. Rules of Crim. Pro., Rule 31(D); N. J. Court Rules, Rule 2:7-9(d); and Fed. Rules Crim. Pro. Rule 31(d).

either party[23] and, if one juror answers that the verdict is not his,[24] the verdict cannot be received. Under these statutes, the right granted to the defendant has been held to be a substantial one and an integral part of trial by jury, so error may be assigned in the event the right is denied.[25] Similarly, as in jurisdictions where the defendant has the right to poll the jury without the benefit of legislation, the application of these statutes has come to require that, in order for there to be a valid poll, each juror must affirmatively assent to the verdict,[26] the request to poll the jury must be timely or the defendant will be assumed to have waived the right,[27] but a request for a poll made before verdict has been returned would be considered premature, hence could properly be denied.[28]

Whether the defendant, at common law, ever had an inviolate right to poll the jury will probably remain an unsolved question. The minority view, which declares that the defendant has no such right but places the matter within the discretion of the trial judge, is an arbitrary view with little more support in law or reason than the oft-repeated statement of an old text writer. The majority view, while itself arbitrary, has as its recommendation the fact that it affords to the defendant in a criminal case still another guaranteed incident to the important right to trial by jury. If this view possessed no more support than that, it still would, in the minds of most people be considered reason enough.

A. H. SCHWARTZ

LANDLORD AND TENANT—PREMISES, AND ENJOYMENT AND USE THEREOF —WHETHER COVENANT BY LANDLORD TO KEEP ELEVATOR IN DEMISED PREMISES IN SAFE CONDITION REDOUNDS TO BENEFIT OF EMPLOYEE OF LESSEE—The liability of a landlord to an employee of a lessee for injury

[23] Burns Ind. Stat. Ann. 1933, § 9-1811, apparently limits the right to poll to the defendant only.

[24] Allowance must be made for Ida. Code Ann. 1946, § 19-2316, which requires that, upon poll, 5/6ths of the jurors must answer in the affirmative. Authority for the 5/6ths verdict is to be found in Ida. Const. 1890, Art. I, § 7. Under Mont. Rev. Code 1947. § 94.7416, if more than 1/3rd of the jurors answer in the negative in a misdemeanor prosecution, the jury must be sent out for further deliberation.

[25] Mackett v. United States, 90 F. (2d) 462 (1937); State v. Callahan, 55 Iowa 364, 7 N. W. 603 (1880); Johnson v. Commonwealth, 308 Ky. 709, 215 S. W. (2d) 838 (1948).

[26] People v. Lopez, 21 Cal. App. 188, 131 P. 104 (1913).

[27] Asher v. Commonwealth, 221 Ky. 700, 299 S. W. 568 (1927); People v. Schneider, 154 App. Div. 203, 139 N. Y. S. 104 (1912). See also 14 Am. Jur., Criminal Law, § 213, p. 916; 53 Am. Jur., Trial, § 1017, p. 704; and 27 R. C. L., Verdict, § 8, p. 839.

[28] Pritchett v. State, 195 Ind. 404, 145 N. E. 488 (1924); Gianino v. State, 183 Ind. 189, 108 N. E. 579 (1915).

arising from breach of a covenant to repair,[1] contained in a lease demising an entire warehouse building to a tenant, was recently discussed in the case of *Alaimo* v. *DuPont*.[2] It appeared therein that the employee, while working in the warehouse, had been fatally injured when a freight elevator of old-fashioned design[3] was unexpectedly put in motion. The administratrix of the employee's estate, after filing a claim for workmen's compensation on which an award was entered, joined with the employer, for the use of its insurer,[4] in a suit against the landlord to recover for the wrongful death.[5] A verdict in favor of the landlord was directed by the trial court. On appeal therefrom, the appellants contended that, as the defendant-lessor had negligently failed to repair the elevator as required by the lease, the lessor should have been held liable for all damage resulting from the breach of the covenant. The Appellate Court for the First District, contrary to the defendant's view that the covenant did not create any duty in favor of the injured person, reversed the trial court when it construed the agreement to be adequate not only to bind the landlord but also to support a recovery in tort.

The law pertaining to tort liability arising from breach of contract has followed a controversial course since the earliest days of the common law, but denial of recovery against the lessor, on the part of the third persons injured while on demised premises because of the complete failure of the lessor to fulfill his contract, can be traced directly to the period when a lease was regarded as the equivalent of a sale of the premises for a term or at will.[6] The fact that the lessor had given his covenant to repair the premises did not affect this view, even when the personal injuries were sustained by the lessee or those in privity with him, for the doctrine, accepted by many early American courts, was that a landlord could not be liable in an action *ex delicto*,[7] particularly since, absent

[1] The lease specifically provided that the lessor, during the term, was to "make repairs and replacements to elevator, elevator machinery and elevator shaft, when required because of ordinary wear and tear." The lessor was given free access to the premises "for purpose of examining" and also for "making any needful repairs or alterations."

[2] 4 Ill. App. (2d) 85, 123 N. E. (2d) 583 (1955).

[3] The elevator, installed when the building was built, was operated by a hand rope cable but was lacking in electro-mechanical interlocks, designed to prevent the elevator doors from being opened when the elevator was not at the landing, and also had no magnetic rope lock, a device which would prevent movement of the cable while the elevator was being loaded or unloaded. The elevator had neither been modernized, kept in order, nor inspected by the lessor for over fifteen years.

[4] Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, §138.5(b).

[5] Ibid., Ch. 70, § 1 et seq.

[6] Keates v. Cadogan, 10 C. B. 591, 138 Eng. Rep. 234 (1851).

[7] See, for example, Dailey v. Vogl, 187 Mo. App. 261, 173 S. W. 707 (1915). It was there stated that the lessor-defendant's contract was merely an agreement to repair a broken walk in the yard and his failure to do so was "nothing but remissness in carrying out a contract."

any concealment or fraud by the landlord as to a known defect in the premises,[8] *caveat emptor* applied[9] and the tenant took the premises as they were. This theory rested on the idea that, as the lessor had surrendered both the possession and the control of the premises, he could do nothing, hence was not liable for disrepair.[10]

With the innovation of the covenant to repair, liability for personal injuries for failure to perform the covenant came to be imposed upon the landlord with greater frequency. In the English case of *Payne* v. *Rogers*,[11] for example, the court held the landlord open to liability in an action on the case for an injury sustained by a stranger from want of repair, provided this want arose from a breach of the landlord's agreement. While the court there did not make any distinction as to whether control of the premises remained in the landlord, so as to render him liable, or whether he would have been exonerated from liability if control had been absent, other courts, in a later period, expounded the theory that the lessor was free from liability to an employee of the lessee in the event control of the building was not in the lessor notwithstanding the presence of a covenant to repair and the reservation of a right of entry for the purpose of making such repairs.[12] Before liability could be imposed, therefore, a duty had to arise and this element of control in the landlord was regarded as essential. Nevertheless, if the contract laid upon the landlord the duty of making such repairs, the necessary control of the premises could be inferred from the landlord's ability to make the needed repairs.[13]

While unanimity of opinion is still lacking on the precise issue, there has been a marked increase during the past two decades in the number

[8] In Stevens v. Pierce, 151 Mass. 207, 23 N. E. 1006 (1890), the court suggested that if any wrong was done to the lessee, his only remedy was in tort for fraud and deceit for inducing him to take the lease, or for negligence in failing to inform him of defects.

[9] Shotwell v. Bloom, 60 Cal. App. (2d) 303, 140 P. (2d) 728 (1943). The court did, however, recognize an exception to the general rule to the effect that the lessor had a duty to inform the lessee of any known defects in the premises and, failing to do so, would be liable for injury to the tenant arising therefrom, which liability could also extend to those who entered in the right of the tenant.

[10] In Cowen v. Sunderland, 145 Mass. 363, 14 N. E. 117 (1887), for example, the lessee was regarded as taking an estate in the premises.

[11] 2 H. Bl. 350, 126 Eng. Rep. 590 (1794). The case is one of the earliest to recognize a tort duty to one outside of the premises even though no duty was owed to the tenant.

[12] The court concerned with the case of Ripple v. Mahoning Nat. Bank, 143 Ohio 614, 56 N. E. (2d) 289 (1944), held that an employee could not recover for injuries sustained from falling plaster in the absence of a showing that the lessor had a right of control to the exclusion of any control by the tenant.

[13] Watkins v. Feinberg, 128 N. J. L. 79, 24 A. (2d) 198 (1942), affirmed in 129 N. J. L. 386, 30 A. (2d) 27 (1943).

of courts modifying the traditional rule[14] so as to permit the assertion of tort liability for personal injuries arising from a breach of covenant but a distinction appears to have been made in the direction of imposing liability where a specific covenant exists and to relieve the landlord from liability where the covenant is to repair generally, the specific covenant being construed as evidence of a degree of retention of control.[15] This distinction was made manifest in the Connecticut case of *Scibek* v. *O'Connell,*[16] where a landlord was held liable for his negligent failure to repair an internal stairway upon receiving notice of the defects, but it might be said that where the agreement is one to make specific repairs no actual notice would be necessary for the agreement itself imports knowledge on the point.[17] By contrast, where the covenant is one to repair generally, and the landlord is deemed not to have control, it has been said that the landlord is not liable for personal injuries since injury of this character would not be the natural or probable consequence of, nor one which could ordinarily and reasonably be anticipated from, the breach of contract.[18] Where, however, the promise to repair contemplates the possibility of personal injury as a consequence of breach,[19] the promise is one to furnish personal safety, so a failure to make such repairs would support recovery for all personal harm sustained by reason of such failure.[20]

In the past, it could be said that a distinct majority and a definite minority view existed but the gap is closing. Although some jurisdictions retain the position there is no basis for liability, others now follow the newer trend. The New York courts intimate the necessity for control by the landlord to hold him liable if there is a covenant to repair, with the added requirement that actual repairs must have been made.[21] Under

[14] See, for example, the case of Breazeale v. Chicago Title & Trust Co., 293 Ill. App. 269, 12 N. E. (2d) 217 (1938), wherein the court, by implication, overruled the holding in Sontag v. O'Hare, 73 Ill. App. 432 (1898).

[15] In Hodges v. Hilton, 173 Miss. 343, 161 So. 686 (1935), the lessor had covenanted to repair a weakened and decayed porch but failed to do so and a sub-lessee was injured. The court said that "the contract to make specific repairs gave the lessor control over the premises for that purpose, and her negligent failure to discharge the duty so assumed gave rise to an action in tort for damages."

[16] 131 Conn. 557, 41 A. (2d) 251 (1945).

[17] Rumberg v. Cutler, 86 Conn. 8, 84 A. 107 (1912).

[18] Rich v. Swalm, 161 Miss. 505, 137 So. 325 (1931).

[19] Farmer v. Alton Bldg. & Loan Ass'n, 294 Ill. 206, 13 N. E. (2d) 652 (1938).

[20] It is the view of the American Law Institute, as embodied in Restatement, Torts, § 357, that a lessor of land should be subject to liability "for bodily injury caused to his lessee and others upon the land with the consent of the lessee or a sub-lessee by a condition of disrepair existing before or after the lessee has taken possession, if (a) the lessor, as such, has agreed by a covenant in the lease or otherwise, to keep the land in repair. . ."

[21] Cullings v. Goetz, 256 N. Y. 287, 176 N. E. 397 (1931).

the present New Jersey rule, liability as to third persons is uncertain.[22] Mississippi, granting that a covenant to repair a specific defect gives the requisite control, still considers that a general covenant does not.[23] Both Maryland[24] and California[25] have accepted the doctrine generally while Massachusetts has found the needed control present in the event the covenant is one to maintain a condition of safety and not simply one to repair.[26]

The decision in the case at hand becomes clearer once this past and present judicial attitude toward liability in tort to third persons for breach of covenant to repair has been ascertained. The local court concerned with the instant case, to some extent, based its decision on the earlier Illinois case of *Cromwell* v. *Allen*.[27] In that case there was an express covenant to repair a building generally and the court stated that, if the covenant to repair amounted to a covenant to keep the premises reasonably safe, then the landlord would be liable for personal injuries received in consequence of a breach of such contract.[28] As the covenant in the instant case was one to repair a special facility and the landlord had the right to examine the premises at reasonable times, he or his agent had an obligation to examine the elevator at such reasonable periods to determine whether ordinary usage of the elevator had given rise to defects as well as a duty to repair when necessary, for the breach of which covenant liability ought to attach. In the absence of proof of any agreement to repair, however, there could be no liability on the part of the owner[29] and, where the party bringing the action is not the covenantee, the recovery against the landlord for personal injuries would have to come through an action *ex delicto,* rather than in an action on the contract,[30] for there would be no room for privity of contract between the landlord and the tenant's employee or invitee.[31]

22 Colligan v. 680 Newark Ave. Realty Corp., 131 N. J. L. 520, 37 A. (2d) 206 (1944). Conceding that a tenant could recover in tort, the court was divided on the question whether others could recover on a similar basis.

23 Rich v. Swalm, 161 Miss. 505, 137 So. 325 (1931).

24 Edelman v. Monouydas, 186 Md. 479, 47 A. (2d) 673 (1950).

25 In Scholey v. Steele, 59 Cal. App. (2d) 402, 138 P. (2d) 733 (1943), the court said that "in the absence of controlling California authority to the contrary, our Supreme Court has followed the Restatement . . . and we are satisfied to do so in this instance."

26 Ryerson v. Fall River Philanthropic Burial Soc., 315 Mass. 244, 52 N. E. (2d) 688 (1943).

27 151 Ill. App. 404 (1909).

28 The court also cited the case of West Chicago Masonic Ass'n v. Cohn, 192 Ill. 210, 61 N. E. 439, 55 L. R. A. 235 (1901).

29 Carson v. Western Hotel Corp., 351 Ill. App. 523, 115 N. E. (2d) 800 (1953).

30 Papallo v. Meriden Sav. Bank, 128 Conn. 563, 24 A. (2d) 472 (1942).

31 Franklin v. Columbia Terminals Co., 150 F. (2d) 667 (1945).

In the light of this analysis, it would appear that to grant to third persons the right to maintain an action in tort for personal injuries sustained through a lessor's breach of a covenant to repair would result in no injustice. The lessor, having been willing at one time to agree to repair to the point where he had reserved a right of entry for the purpose of making repairs, cannot claim that he owes no duty to anyone but the lessee, for he has a degree of control over the premises. Aware of the hazardous potentialities to be found in elevators, to the point where "dangerous consequences naturally and usually come as a result of not keeping such in good condition and repair,"[32] the lessor should not be relieved of liability of some kind to third persons. To impose liability on the landlord, as was done in the instant case, serves to do no more than place responsibility upon the person who is, and should be, legally responsible for the injuries.

A. P. PACELLI

OBSCENITY—INDICTMENT OR INFORMATION—WHETHER USE OF OBSCENE LANGUAGE OVER A TELEPHONE AMOUNTS TO A CRIMINAL OFFENSE—The Superior Court of Pennsylvania, through the medium of the case of *Commonwealth* v. *Mochan*,[1] was recently asked to determine whether the conduct of an individual who had repeatedly used a four-party telephone line to call a married woman of the highest character and who had, in the course of his conversations, used language that was obscene, opprobious, lewd and filthy,[2] was subject to prosecution as for a common law offense. After trial before a court sitting without a jury, the defendant was convicted despite his motion to arrest judgment on the ground the acts charged were not an offense either at common law or by statute. On appeal from this conviction, a majority of the judges, while admitting that no precedent directly in point existed, affirmed the conviction on the ground that it was a misdemeanor at common law to engage in any conduct which openly outraged decency and was injurious to public morals and that the defendant's conduct fell within the scope of that offense.

It is clear that, at common law, for an act to be considered obscene and punishable as a misdemeanor, it had to be of such a nature as would tend to corrupt the morals of the king's subjects and be against the peace

32 Trego v. Rubovits, 178 Ill. App. 127 at 133 (1913).

1 — Pa. Super. —, 110 A. (2d) 788 (1955). Woodside, J., wrote a dissenting opinion in which Gunther, J., concurred.

2 The defendant not only intimated that the person called was a woman of ill fame but, in addition to suggesting adulterous intercourse, talked of sodomy as well, in the loathsome language of that criminal act.

of the king[3] and it is within this general definition that search must be made to ascertain whether the use of vulgar language, spoken over a telephone in the course of a private conversation, could be considered to be a common law crime. Without doubt, an indictment would lie if the vulgar words were written rather than spoken,[4] for the quality of permanence in the act, with its corresponding reaction upon public morals and decency, were said to be the reason why obscene writings and pictures were indictable, for the mere viewing of such obscene matter would tend to excite lust as well as lewd thoughts and immoral tendencies.[5] But the very court which, in the case of *Rex* v. *Curl*,[6] had said that the publication of an obscene, lewd book was a crime, also went on to say that, while common law was common usage, "where there is no law there can be no transgression."[7] For this reason, private drunkenness or cursing and swearing were not punishable, unless the conduct also involved a breach of the peace,[8] it being the then object of the law to protect public morals and not the feelings of individuals.[9]

Among the earlier, and leading, American cases which considered the utterance of vulgar language in public as an indictable offense on common law principles are the cases of *Bell* v. *State*[10] and *State* v. *Appling*,[11] but it must be noted that the cases there relied upon as precedent[12] were of the public offense category and involved conduct other than oral conversation. Other American cases which have classed obscenity as a common law offense also reveal that the matter of concern was not vulgar language but rather some obscene act such as the public exposure of the private parts of the human body.[13] It would, therefore,

3 Rex v. Curl, 2 Strange 788, 1 Barn. K. B. 29, 17 State Tr. 153, 15 Dig. 748 (1727).

4 Regina v. Langley, Holt K. B. 654, 90 Eng. Rep. 1261 (1704).

5 Commonwealth v. Sharpless, 2 Serg. & R. 91, 7 Am. Dec. 632 (Penn., 1815); People v. Ohneth, 339 Ill. App. 247, 89 N. E. (2d) 433 (1949), abst. opin.

6 See citation in note 3, ante.

7 2 Strange 788 at 791.

8 Rex v. Heyward, Cro. Car. 499, 79 Eng. Rep. 1030 (1638).

9 Ex parte Marlborough, 5 Q. B. 955, 114 Eng. Rep. 1508 (1844); Ex parte Chapman, 4 Ad. & Ellis 773, 111 Eng. Rep. 974 (1836); Rex v. Curl, 2 Strange 789 (1727); Regina v. Langley, Holt K. B. 654, 90 Eng. Rep. 1261 (1704); Rex v. Heyward, Cro. Car. 499, 79 Eng. Rep. 1030 (1638).

10 1 Swan 42 (Tenn., 1851).

11 25 Mo. 315, 69 Am. Dec. 469 (1857).

12 In Gushman v. State, 2 Yerg. 589 (Tenn., 1831), the defendants were charged with lewd acts of fornication and adultery committed openly, notoriously and publicly. In the other case, that of Commonwealth v. Sharpless, 2 Serg. & R. 91, 7 Am. Dec. 632 (Penn., 1815), the defendants charged an admission price to view obscene pictures.

13 Winters v. New York, 333 U. S. 507, 68 St. Ct. 665, 92 L. Ed. 840 (1948); State v. Rose, 32 Mo. 560 (1862); State v. Pfenninger, 76 Mo. App. 313 (1898); Hixon v. State, 96 Okla. Crim. 311, 254 P. (2d) 387 (1953); Noblett v. Commonwealth, 194 Va. 241, 72 S. E. (2d) 241 (1952).

seem to be improper to classify vulgar language in the same category as improper exposure of the body and to convict one for the use of vulgar language as if it were a common law crime.[14]

Because this is so, a few states have enacted statutes which specifically provide for punishment in the event vulgar language is used over a telephone in a conversation with a female listener.[15] The remaining states fall into two general categories, those having obscenity legislation intended to cope with this problem generally but which legislation would have to be judicially interpreted before the same could be said to be applicable to facts such as appeared in the instant case, and those where the statute is clearly inadequate or totally lacking. As to the first, the statutes generally prohibit the use of obscene, or vulgar, language in the presence, or within the hearing, of a female,[16] but would need interpretation to determine whether a person using such language in the course of a telephone conversation could be considered to be in the "presence" of the female listener.[17] While this would not be too difficult a problem to resolve, the other states either have no statute[18] or possess one which is directed against obscene books, paintings, writings, or the like.[19] Since, in these states, the statute could not possibly be interpreted to apply to the spoken language, much less when used in private telephonic conversation, some amendment would be necessary before these states could be said to have adequate legislation to cope with this problem.[20]

[14] Commonwealth v. Kane, 65 Pa. Super. 258 (1916); State v. Benedict, 11 Vt. 236, 34 Am. Dec. 688 (1839); State v. Steger, 94 W. Va. 576, 119 S. E. 682, 34 A. L. R. 570 (1923).

[15] See particularly No. Car. Gen. Stats. 1953, Ch. 14, §14-196:1; Va. Code 1950, Vol. 4, §18-115; and W. Va. Code 1949, Ch. 61, §6071.

[16] Ala. Code 1940, Tit. 14, Ch. 4, § 11; Ariz. Code Ann. 1939, Ch. 43, § 3001; Fla. Stats. Ann. 1941, § 847.04-05; Ga. Code Ann. 1933, Ch. 26, § 6303; Burns Ind. Stats. Ann. 1933, § 10-2801; Iowa Code Ann. 1946, § 725.11; Ky. Rev. Stat. 1953, § 436.150; Me. Rev. Stat. 1954, Vol. 4, Ch. 134, § 4; Neb. Rev. Stats. 1948, § 28-920; Page's Ohio Gen. Code 1939, § 13032; Okla. Stat. Ann. 1936, Tit. 21, Ch. 36, § 906; R. I. Gen. Laws 1938, Ch. 610, § 17; S. D. Code 1939, § 13.1708; Remington Wash. Rev. Code 1951, § 9.68.040; and D. C. Code 1940, § 22-1107. For application of the Alabama provision see Newman v. State, 257 Ala. 239, 58 So. (2d) 142 (1952), affirmed in 257 Ala. 174, 58 So. (2d) 144 (1952), and McGraw v. State, 34 Ala. App. 43, 36 So. (2d) 559 (1948), affirmed in 251 Ala. 123, 36 So. (2d) 560 (1948).

[17] On this point, see McClung v. State, 62 Ga. App. 892, 10 S. E. (2d) 303 (1940).

[18] There would seem to be an absence of legislation in Delaware, Kansas, New Mexico, and North Dakota.

[19] Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 468, may be considered to be typical. See also, ibid.. Ch. 38, §§ 159 and 159a. A more extended list of these statutes appears in a note in 28 CHICAGO-KENT LAW REVIEW 163 to the case of People v. Strassner, 299 N. Y. 325, 87 N. E. (2d) 280 (1949), on the point as to whether or not the possession of an obscene phonograph record is within the statutory prohibition.

[20] Hon. Wm. V. Daly, Judge of the Municipal Court of Chicago, in an address to the Chicago Bar Association on the subject of preliminary proceedings in the Municipal Court, has said: "For the lack of any other charge, numerous defend-

It is to be regretted that the Governor of Illinois should have deemed it proper to veto a bill on the point which was passed during the recent session of the Illinois General Assembly.[21] As the statute was specifically designed to prohibit the use of obscene language over the telephone, this state would have been able to count itself among the few states with definite legislation under which it would have been clearly possible to combat a modern evil. Because of the veto, and since reliance on common law principles would appear inadequate, the state and its population has been left unprotected for two more years.

S. ZABAN

PHYSICIANS AND SURGEONS—ACTIONS FOR NEGLIGENCE OR MALPRACTICE —WHETHER, AFTER LIMITATION PERIOD ON SUIT FOR MALPRACTICE HAS RUN, PATIENT MAY SUE DENTIST FOR BREACH OF WARRANTY AS TO DENTURES SOLD AND SUPPLIED—By means of the attempt made in the case of *Cox* v. *Cartwright*[1] to impose an obligation in contract upon a dentist, in addition to a potential tort liability for malpractice in fitting a partial plate in the mouth of the cross-petitioner, the Court of Appeals of Ohio was presented with an interesting issue concerning the applicability of an Ohio statute of limitation.[2] The dentist had apparently sued to recover his unpaid charges and was met with a cross-petition wherein it was alleged that he had agreed to extract certain of the cross-petitioner's teeth and to fit a partial plate in the opening so made but that the work done was of inferior quality thereby causing pain and suffering, a re-

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ants have been charged with violation of the state and city disorderly sections for calling girls on the telephone . . . and using vile, indecent and lascivious language. Many were convicted because of the lack of preparation on the part of the attorneys. Neither this vile conduct or even the sending of vile and indecent literature through the mail violates the state or municipal laws." See 36 Chicago Bar Record 255 at 257 (1955).

21 See H.B. 324, 69th General Assembly, 1955. The bill contained two sections, the first of which declared that any person "who sends messages or uses language or terms which are obscene, lewd or immoral with the intent to offend by means of or while using telephone or telegraph facilities, equipment or wires . . . is guilty of a misdemeanor . . ." The second provided punishment by fine not to exceed $300 or a jail term not to exceed six months, or both.

1 96 Ohio App. 245, 121 N. E. (2d) 673 (1953). The cross-petition proceeded on the assumption that the dentist "sold" a partial plate so as to make certain implied warranties of fitness apply to the transaction. This aspect of the problem has not been discussed. As to whether a hospital, which furnished tainted blood in the course of a blood transfusion and caused the patient to suffer from serum hepatitis, had engaged in a "sale," or merely rendered a service, see Perlmutter v. Beth David Hospital, 308 N. Y. 100, 123 N. E. (2d) 792 (1954), reversing 283 App. Div. 789, 129 N. Y. S. (2d) 232 (1954). Froessel, Jr., wrote a dissenting opinion therein which was concurred in by Conway and Dye, JJ.

2 Ohio Rev. Code 1953, § 2305.11, states that actions for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice shall be brought "within one year after the causes thereof have accrued."

sultant loss of work, and forced the expenditure of other money paid to another dentist to remedy the condition. The dentist demurred to the cross-petition, saying that the claim on the facts alleged was barred by a special statute relating to malpractice actions. The patient attempted to meet this objection by asserting that the claim was, in reality, one arising from breach of warranty[3] but the court sustained the demurrer and dismissed the cross-petition. On appeal, this holding was affirmed when the court concluded that, regardless whether the action was strictly in tort or for breach of contract, it was still an action to recover damages for malpractice so was governed by the shorter of the two periods of limitation.

The problem which confronted the Court of Appeals of Ohio had, under similar circumstances, been before the courts of numerous other states and had generally been decided by these courts in much the same fashion so that the general rule can be stated to be that any special limitation period prescribed for actions against physicians, surgeons or dentists for malpractice or negligence leading to personal injury will apply to all actions arising from such causes, whether the complaint is in the form of a tort suit or an action on contract. Usually, no attempt is made to distinguish between the three professions but in one case, that of *Hurlbert* v. *Gillett*,[4] the court did find it necessary to decide whether a statute of limitation with respect to actions for malpractice also extended to dentists. In other jurisdictions, no real problem can exist as to which statute of limitation will apply[5] and, in still others, as in Illinois, the problem would not exist as a practical matter if the injured party does no more than seek to assert his claim by way of setoff or counterclaim to a suit directed against him.[6]

In situations where the problem can exist, as where no special malpractice statute is present, the tort suit is barred, but a contract claim appears to be still enforcible, one may be tempted to rely too quickly on

3 In that event, Ohio Rev. Code 1953, § 2307.07, dealing with actions upon contracts not in writing, whether express or implied, would control. It states that actions of this nature are to be brought within six years. The cross-petition was filed well within the six-year limit although more than one year after the dentist had performed his services.

4 96 Misc. 585, 161 N. Y. S. 994 (1916). The court held the statute applicable to dentists although not expressly named therein.

5 For example, Ala. Code 1923, § 8949, places a one-year limitation on actions for injury to the person or rights of another "*not arising from contract* and not herein specifically enumerated." Italics added. An application thereof may be noted in the case of Sellers v. Noah, 209 Ala. 103, 95 So. 167 (1923).

6 Ill. Rev. Stat. 1953, Vol. 2, Ch. 83, § 18, declares that "a defendant may plead a setoff or counterclaim barred by the statute of limitations, while held and owned by him, to any action, the cause of which was owned by the plaintiff or person under whom he claims, before such setoff or counterclaim was so barred, and not otherwise." Ohio has no similar statute.

the rule that, out of one act, several causes of action may arise. Nevertheless, the plaintiffs in the cases of *Keirsey* v. *McNeemer*[7] and *Peters* v. *Howard*[8] were both informed that an action for malpractice was barred by the two-year limitation prescribed for actions for personal injuries[9] and would not be governed by the five-year limitation applicable to actions on oral contracts,[10] so the rule in Illinois would seem to accord with the majority rule aforementioned, particularly since the gist of the claim is negligence, which ought to be governed by the statute of limitation for personal injury and not that applicable to violation of a contract of employment. The Supreme Court of Missouri, in the case of *Barnhoff* v. *Aldridge*,[11] also clearly stated that the choice between statutes of limitation would not be determined by the form of the action but by its object, even where the defendant was in the course of performing an express contract between himself and the plaintiff and the form of the action was in assumpsit.[12]

Nevertheless, these views do not seem to have exerted any influence in the several other jurisdictions which constitute the minority. In these states, courts hold that, in the event the action purports to be one for breach of contract, the limitation period applicable to contract suits should govern. The minority rule is illustrated by the Connecticut case of *Hickey* v. *Slattery*[13] wherein it was held that, although a cause of action for negligence was barred, this fact possessed no effect with reference to a cause of action arising out of contract, since two distinct causes of action could arise out of one delict, with each being governed by the statute of limitation appropriate to it. The Supreme Court of Indiana also passed on this question at a very early date, in the form of the two cases entitled *Staley* v. *Jameson*[14] and *Burns* v. *Borenfield*,[15] both of which also fall into the minority classification. The danger inherent in

[7] 197 Ill. App. 173 (1915).

[8] 206 Ill. App. 610 (1917).

[9] Ill. Rev. Stat. 1953, Vol. 2, Ch. 83, § 15.

[10] Ibid., Ch. 83, § 16.

[11] 327 Mo. 767, 38 S. W. (2d) 1029, 74 A. L. R. 1252 (1931).

[12] In Klingbeil v. Saucerman, 165 Wis. 60, 160 N. W. 1051, I. A. L. R. 1311 (1917), it was said that the word "action", as used in a Wisconsin limitation statute regarding injury, had reference to the subject matter or notice thereof and not to the form as a matter of remedial procedure.

[13] 103 Conn. 716, 131 A. 558 (1926). The complaint there was in two counts; one based on an implied obligation on the part of the defendant physician arising out of his employment in treating a broken arm, the other based on negligence in the manner of treatment.

[14] 46 Ind. 159, 15 Am. Rep. 285 (1874). It was here alleged that the defendant had been employed for a consideration and, because of negligence in the performance, the efficiency of the arm of the plaintiff was destroyed.

[15] 84 Ind. 43 (1882).

this view, however, was foreseen by the Rhode Island Supreme Court when it decided the case of *Griffin* v. *Woodhead*[16] for it there pointed out that the plaintiff should not be able to determine the period of limitation for himself by the manner in which he framed his petition.[17] Despite this, a later New York court, in *Colvin* v. *Smith*,[18] permitted the plaintiff to have that choice and, even more recently, the Court of Appeals of that state, in *Robins* v. *Finestone*,[19] held that it was possible for a physician to contract to cure the patient, rather than merely to render service in a professional and skillful manner, so that the remedy for breach was appropriately one in contract rather than in tort, with the limitation problem being governed accordingly.

As it is generally the purpose of limitation statutes to set a definite time period beyond which litigation may not be maintained, to the end that disputes between parties may be set at rest, the decisions under the minority view undoubtedly render this basic purpose less effective. The adherents of the majority rule at least are entitled to credit for having retained some degree of certainty in at least one phase of law.

L. J. STUKEL

16 30 R. I. 204, 74 A. 417 (1909).

17 This thought was also expressed by the writer of a note in 16 St. John's L. Rev. 101 (1941), where it was pointed out that if a plaintiff wished to avoid a short period of limitation he could base his claim on contract instead of malpractice and, while no recovery for wrongs involving unskillful treatment and for pain and suffering occasioned thereby could be had, it would still be possible to recover sums expended for further medical attention or other damages flowing naturally from the breach of whatever contract the parties had made.

18 276 App. Div. 9, 92 N. Y. S. (2d) 794 (1949).

19 308 N. Y. 543, 127 N. E. (2d) 330 (1955).